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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 413

DIXIE GREYHOUND LINES, INC., ET AL.,
Petitioners,

vs.

LAMAR C. ATKINSON AND ROSS R. BARNETT.

PETITION FOR WRIT OF CERTIORARI, WITH BRIEF THEREUPON, TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

LONGSTREET HEISKELL,
WILLIAM H. WATKINS,
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SUPREME COURT OF THE UNITED STATES

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No. 413

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vs.

LAMAR C. ATKINSON AND ROSS R. BARNETT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Dixie Greyhound Lines, Inc., Teche Lines, Inc., and W. H. Watkins and P. H. Eager, Jr., their sureties, petitioners, as against Lamar C. Atkinson, plaintiff in the District Court of the United States for the Southern District of Mississippi, and Ross R. Barnett, surety on his appeal bond from the District Court, called respondents.

A.

Summary Statement of Matters Involved.

1. The suit was filed in the United States District Court for the Southern District of Mississippi by Lamar C. At-

kinson, plaintiff, hereinafter referred to as respondent, against the Dixie Greyhound Lines, Inc. and the Teche Lines, Inc., petitioners herein. The petitioners were interstate common carriers, operating passenger busses through the State of Mississippi. The Dixie Greyhound Lines, Inc., hereinafter referred to as the "Dixie", maintained a union station in the City of Jackson, Mississippi, where its busses carrying passengers stopped for putting off and taking on passengers. The facilities of the station for such purposes were used by the Teche Lines, Inc., one of the petitioners, hereinafter referred to as "Teche Lines", and was likewise used by a third common carrier of passengers by busses. The respondent, Atkinson, plaintiff in the District Court of the United States, alleged that on the night of January 27, 1940, intending to become a passenger on one of the busses going south from the station maintained by Dixie, went into the station about one o'clock A. M., was informed that the next bus went south at four thirty A. M., took his seat in the station, thereby alleged that he became a passenger and was entitled to be protected as such, and that some time later, the night ticket agent wrongfully called policemen to the station, had him arrested and taken to the Municipal Court where he was detained for some time. Wherefore, he sued for the wrongful arrest, detention, inconvenience, humiliation, etc., claimed to have been suffered in violation of his right as a passenger, including exemplary damages (R. 1-14).

Issue was taken thereupon. The case was tried, and at the conclusion of the respondent's testimony, verdict was directed for the petitioners. On motion for new trial, the District Judge held that under the case of *Andrews* v. *Railroad Company*, 86 Miss. 129, 38 So. 773, the respondent was not a passenger and the petitioners owed him no duty. Appeal was taken to the United States Circuit Court of Appeals, Fifth Circuit, and the judgment of the court below

was reversed. *Atkinson* v. *Dixie Greyhound Lines, Inc.*, 125 Fed. (2d) 237 (R. 4). The case was re-tried in the United States District Court. At the second trial, the respondent's testimony was substantially the same as that introduced on the former appeal, and the petitioners thoroughly developed their defenses. A judgment was rendered in favor of the respondent against petitioners for the sum of Five Hundred Dollars ($500.00) actual damages. The respondent prosecuted an appeal to the United States Circuit Court of Appeals, Fifth Circuit, because of the alleged refusal of the District Judge to submit to the jury the question of exemplary damages, and petitioners took a cross-appeal. The petitioners requested a directed verdict at the conclusion of respondent's testimony (R. 69); moved for a directed verdict at the conclusion of all of the testimony (R. 120), to which action of the court petitioners excepted (R. 136). The respondent filed motion for a new trial only on the question of exemplary damages (R. 142). The petitioners filed a motion for a new trial and for judgment notwithstanding the verdict, and motion for a new trial in the alternative (R. 149). Appropriate exceptions were noted by petitioners to the action of the court.

On cross-appeal to the United States Circuit Court of Appeals the petitioners urged as error and as ground for reversal that they were not liable to the respondent, and judgment should have been entered in their favor at each stage in the proceedings for the following reasons, all of which questions are presented and involved in this application for certiorari.

1. Respondent, Atkinson, entered petitioners' station three and one-half hours before the arrival of the next bus going south, upon which he desired to take passage, and, therefore, was not a passenger, but at the utmost was a licensee subject to ejection at any time.

2. Between the hours of one o'clock A. M. and seven o'clock A. M. persons were not permitted to remain in the station unless such persons acquired a ticket. This respondent refused to do so upon request, the petitioners asserting that the rule was a valid one in the interest of the public and that, in any event, the respondent might have avoided any controversy by purchasing a ticket and preventing his ejection.

3. The night ticket agent was without authority to cause the respondent's arrest, if he did so, which is denied.

4. The petitioners' night ticket agent did not instigate the arrest of respondent but that the same was had by officers called to the station for reasons of their own.

5. Under no circumstances were petitioners liable for exemplary damages.

The facts in the case were largely undisputed. We will direct the attention of the court to such conflict as there was. The respondent lived some ten or twelve miles south of Jackson, Mississippi, on Highway 51, was working at a restaurant in the suburbs of Jackson. About one o'clock in the morning of January 27th, he went to the union station owned by the Dixie and used by both petitioners; the respondent in going to his home would travel over the Teche Line. The night was cold; he has been working some sixteen and one-half hours. On entering the station, he went to the ticket window where the night agent was on duty. The respondent did not ask to purchase a ticket, merely asked such employee what time the next bus went south and was informed that such bus would go south at 4:30 o'clock. Respondent claims that he had $1.00 in his hand to purchase a ticket which would cost twenty-five cents, but admits that he did not ask the agent for a ticket. It appeared from the proof that it was not unusual for persons

coming into the station to go to the ticket window and ask of the arrival of a bus, but that such inquiry would not indicate the purpose of the inquirer to remain in the station during the period (R. 23-25). Assuming that the respondent had money in his hand, he did not so inform the ticket agent or hold it so that it could be seen. Respondent was of the opinion that the night ticket agent was acquainted with him since he customarily took that route home after his day's work (R. 25) (R. 40). Cross-examination of Billingsley (R. 2, 3, 4, 5). The night was very cold; respondent was tired and determined to remain in the station until the arrival of the southbound bus. He went upstairs on the mezzanine floor, a quiet place, where there was a wash room and lavatory. There were benches on the mezzanine floor. The respondent availed himself of the facilities of the mezzanine floor and admittedly went to sleep on a bench. That is to say, he was using the petitioners' facilities as a substitute for a hotel. Persons were not permitted on the mezzanine floor, however, unless such persons had previously purchased a ticket (Supplemental Record 6, R. 166). The Dixie operated the union station at Jackson, Mississippi, furnished the employees and permitted other carriers to use it. It promulgated a rule to the effect that persons coming into the station from one to seven o'clock in the morning must purchase a ticket if such person desired to remain in the station, otherwise would be required to leave. This rule was had and enforced for sanitary reasons, especially in very cold weather where the presence of loafers and other unauthorized persons would create conditions not desirable. Not only that, but the presence of licensees or trespassers would render the effects of passengers subject to theft, and women passengers might be accosted and insulted by strange men. This rule was uniform in its application throughout the Greyhound System, as well as other bus systems, and was had by railroad companies. The

union station at Jackson, Mississippi (with a population of some seventy thousand people), was maintained by the Dixie for its own use and other bus carriers, some twelve hundred passengers passing through the station daily. The Dixie at times had experimented with a relaxation of the rule requiring persons between one o'clock and seven o'clock to buy tickets, and found that the station was filled with loafers especially during cold weather, and that there arose complaints of the theft of baggage, and women passengers complained of being insulted by strange men. These facts were undisputed. Billingsley, direct examination (R. 52), (R. 58); Billingsley, cross-examination (Supplemental Record 1, R. 161); A. J. Emery (R. 100) (R. 104). In view of this rule, respondent having come into the station at one o'clock A. M., the overwhelming weight of the testimony showed that Billingsley, the night ticket agent, went to him three times and requested him to buy a ticket, to which the respondent replied that he was going south to Byram, would get a ticket when he saw fit. Whereupon, Billingsley, purely for the purpose of having respondent ejected from the station unless he should buy a ticket, requested police headquarters to send a policeman to the station.

At this point, we call the attention of the Court to a slight conflict in the testimony. Shortly after the suit was filed, under the Federal Rules, petitioners gave notice of their desire to take the deposition of respondent in order that petitioners might prepare their defense. The testimony was taken and the respondent, under oath, testified that the ticket agent requested him three times to purchase a ticket, which he refused to do, and that the only controversy he had with the ticket agent was over his refusal to acquire a ticket, and that this conduct on his part was reported to the policeman in his presence, that he was ejected from the station solely because he refused to buy a ticket, and had no other

controversy with the ticket agent. This examination took place in the presence of respondent's counsel (R. 109-118). However, at the trial of the case, the respondent testified that respondent denied giving any such testimony, and testified that Billingsley came to him on the mezzanine floor, asked him where he was going, and told him that he had until four thirty to get a ticket. The policemen arrived at the station, found the respondent asleep on the mezzanine floor, and according to their testimony, awoke him and three times told him he must get a ticket or they would take him from the station. This he declined to do. Respondent denied that anything was said to him about buying a ticket, and that when the policemen came up, the ticket agent said that he had been loafing around there for several days. The policeman testified that the respondent was in a disheveled condition, wouldn't give him his name, wouldn't tell him where he was going, refused to buy a ticket, and that he had the appearance of being under the influence of liquor or a narcotic; and that without any suggestion on the part of Billingsley, the ticket agent, they searched him, took him to police headquarters some four blocks away, no charge was preferred against him; some policeman came up who knew the respondent and said that he was harmless but peculiar and requested that he be discharged; and the policeman offered to take him back to the station or let him spend the night in the Municipal Courtroom. There is a very strong inference in the record that he did so. Barney Fitzpatrick (R. 75-77); J. B. Hines (R. 90-98). The respondent was a highly interested witness, his testimony was corroborated in no particular, and was contradicted not only by his own sworn examination but by convincing, independent, disinterested testimony. The trial judge submitted the case to the jury, and the jury returned a verdict for $500.00 in favor of the respondent. Both sides appeal. The United States Circuit Court of Appeals, Fifth Circuit, affirmed the

case on cross-appeal, as well as direct appeal, except as to the question of exemplary damages, and remanded the case to be tried on that issue alone (R. 175).

B.

Basis upon Which It Is Claimed this Court Has Jurisdiction.

The jurisdiction of this court is invoked under Judicial Code, Section 240, as amended by Act of Feb. 13, 1925, 43 Stat. 938, Section 347, 28 U. S. C. A.

C.

Specifications of Error and Questions Presented.

There is presented under this petition the action of the United States Circuit Court of Appeals in affirming the judgment appealed from on cross appeal and reversing the direct appeal as to exemplary damages. Petitioners submit that the United States Circuit Court of Appeals erroneously affirmed the case on petitioners' cross appeal and erroneously reversed the case on respondent's direct appeal on the question of exemplary damages, for the following reasons, to-wit:

1. The Court of Appeals rendered a decision at variance with applicable decisions of the Supreme Court of Mississippi in the following particulars, to-wit:

(1) The court erroneously held that the question as to whether or not respondent was a passenger was a question for the jury, whereas, under the applicable decisions of the Supreme Court of Mississippi, respondent was a trespasser, and at best, a licensee, subject to eviction at any time, respondent having gone into the bus station more than three hours prior to the arrival of the bus for purposes of his own and refused to buy a ticket when requested, as provided by the rules and regulations of petitioners.

(2) The court erroneously held that under the evidence the jury was justified in finding that Billingsley, the ticket agent, instigated the arrest of respondent.

(3) The court erroneously held that the jury was justified in finding that Billingsley acted in the scope of his employment in causing the arrest of respondent, if, in fact, he did so.

(4) The court erred in holding that the petitioners were liable to the respondent for damages and in sustaining the judgment rendered against them in the District Court.

(5) The court erred in holding that the evidence justified the submission to the jury the question of petitioners' liability for exemplary damages and the reversal of the direct appeal to such extent.

(6) The court committed error in holding that under Federal Rule 59 the case should be reversed to be tried anew upon the question of exemplary damages alone, whereas, there should have been a general reversal.

(7) The court committed error in failing and refusing to reverse the case on direct appeal and direct a verdict for petitioners.

D.

Reasons for Allowing Writ of Certiorari with Citation of Cases Supporting the Jurisdiction of the Court.

This is an appropriate case for the granting of a writ of certiorari by this court. The questions involved are of public importance arising under the laws of the State of Mississippi, as well as important questions of Federal Law.

1. As to the questions of Mississippi Law involved, its decisions are controlling and, as hereinbefore set out, the decision of the United States Circuit Court of Appeals, Fifth Circuit, is at variance therewith. The questions of Mississippi Law involved are of public importance. Peti-

tioners are common carriers of passengers, and under the law there is imposed a very high degree of care upon them in the protection of the health, persons, property and sensibilities of passengers. Petitioners would be greatly embarrassed in the discharge of their important obligations to the public if they may be held liable to a mere licensee in the union station, admittedly using such station as a substitute for a hotel, pending the arrival of a bus not due to arrive for three and one-half hours. This court has frequently granted writs of certiorari involving important questions of State Law. The following cases are illustrative: *James Lanier Bell, Petitioner,* v. *Preferred Life Assurance Society of Montgomery, Alabama,* —— U. S.——, decided November 8, 1943, 88 L. Ed., Advance Sheets 6; *W. J. Meredith, et al., Petitioners,* v. *City of Winter Haven,* decided November 8, 1943, —— U. S. ——, 88 L. Ed., Advance Sheets 1; *Magnolia Petroleum Company* v. *Sullivan H. Hunt,* decided December 20, 1943, —— U. S. ——, Advance Sheets, 88 L. Ed. 161; *Irene Brady, Admrx.,* v. *Southern Railway Company,* decided December 20, 1943, —— U. S. ——, Advance Sheets, 88 L. Ed. 189; *William J. Demorest, Jr.* v. *City Bank Farmers Trust Company, Trustee,* decided January 17, 1944, —— U. S. ——, 88 L. Ed., Advance Sheets 340; *Goodyear Tire & Rubber Company, Inc.* v. *Ray-O-Vac Company,* decided February 28, 1944, —— U. S., ——, 88 L. Ed., Advance Sheets, Page 475, (holding that the court would sometimes examine the evidence, although approved by two courts); *J. M. Sartor, et al.,* v. *Arkansas Natural Gas Corporation,* decided March 27, 1944, —— U. S., ——, 88 L. Ed., Advance Sheets 597; *Crites, Inc.* v. *Prudential Insurance Company,* decided May 22, 1944, —— U. S. ——, 88 L. Ed., Advance Sheets 989; *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290; *Stoner* v. *New York Life Insurance Company,* 311 U. S. 464, 85 L. Ed 284.

2. The case involved also an important question of Federal Law never before decided by this court, or any United States Circuit Court of Appeals, as to whether or not under the Seventh Amendment to the Constitution of the United States, guaranteeing trial by jury, under Rules of Civil Procedure, 59, a case may be reversed to be tried only upon the queston of punitive damages, whereas, here, the new trial upon such question would involve every issue of fact presented on the original trial, and great injustice would probably be done the petitioners. The petitioners file herewith ten printed copies of the record as printed below, together with the proceedings and opinion in the United States Circuit Court of Appeals.

3. And for other reasons appearing there to be assigned at the hearing.

WHEREFORE, petitioners pray for a writ of certiorari from this Honorable Court, directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day therein named, a full and complete transcript of the record and all proceedings in the case of *Dixie Greyhound Lines, Inc.* and *Teche Lines, Inc. v. Lamar C. Atkinson,* Cause No. 10, 662 on the docket of the Court, and that said judgment of said Court may be reversed and petitioners afforded appropriate relief.

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